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In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements to the agency regarding allegations that the employee had engaged in employment-related misconduct.

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OPINIONS BELOW

The decision of the court of appeals in *King* v. *Erickson* (Pet. App. 1a-23a) is reported at 89 F.3d 1575. The decision of the court of appeals in *King* v. *McManus* (Pet. App. 24a-28a) is unpublished, but the decision is noted at 92 F.3d 1208 (Table). The decision of the Merit Systems Protection Board (MSPB) in *Walsh* v. *Department of Veterans Affairs* (Pet. App. 29a-49a) is reported at 62 M.S.P.R. 586. The decision of the MSPB in *Erickson* v. *Department of the*

Treasury (Pet. App. 50a-58a), is reported at 63 M.S.P.R. 80. The decision of the MSPB in *Kye* v. *Defense Logistics Agency* (Pet. App. 59a-69a) is reported at 64 M.S.P.R. 570. The decision of the MSPB in *Barrett* v. *Department of the Interior* (Pet. App. 70a-96a) is reported at 65 M.S.P.R. 186. The decision of the MSPB in *McManus* v. *Department of Justice* (Pet. App. 97a-105a) is reported at 66 M.S.P.R. 564.

JURISDICTION

The judgment of the court of appeals in *King* v. *Erickson* was entered on July 16, 1996. Pet. App. 1a. The judgment of the court of appeals in *King* v. *McManus* was entered on July 22, 1996. Pet. App. 24a. Petitions for rehearing in both cases were denied on November 4, 1996. Pet. App. 106a-109a. On January 27, 1997, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 4, 1997. The petition for a writ of certiorari was filed on March 4, 1997, and was granted on June 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT

These two cases arise from disciplinary proceedings against six federal employees. All six were disciplined or removed by their employing agencies for committing employment-related misconduct and for making false statements to their agencies about their misconduct. Pursuant to the Civil Service Re-

form Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, each employee appealed to the Merit Systems Protection Board (MSPB). The MSPB sustained one or more underlying charges of misconduct as to each employee, but refused to permit any of the employees to be disciplined for making false statements. In light of that refusal, the MSPB also reduced the sanction imposed upon each employee. Petitioner King, the Director of the Office of Personnel Management, appealed the MSPB's decisions to the United States Court of Appeals for the Federal Circuit, which affirmed.

1. a. *Walsh.* Respondent Jeanette Walsh worked as a Social Services Assistant at a medical center operated by the Department of Veterans Affairs in St. Cloud, Minnesota. Pet. App. 2a. The medical center received information that Walsh had engaged in sexual relations with a patient and had committed other misconduct. *Id.* at 33a. In statements to her supervisor and to agency investigators, Walsh acknowledged having had a sexual relationship with the patient for approximately 18 months, but claimed that the relationship did not begin until November 1988, after the patient had been discharged from the medical center. *Id.* at 31a-32a.

After completing an investigation, the medical center notified Walsh that it proposed to remove her for engaging in sexual relations with a patient, committing other misconduct, and making false statements to her supervisor and to agency investigators about her misconduct. Walsh Initial Decision 2-4 (No. CH-0752-92-0021-I-1) (MSPB Feb. 7, 1992). The agency subsequently removed her, and Walsh appealed to the MSPB. Proceedings before the MSPB were initially conducted before an administrative

judge. See 5 U.S.C. 7701(b)(1). In an affidavit submitted during these proceedings, Walsh stated that she had had sexual relations with the patient only three or four times, during the summer of 1989. Pet. App. 31a-32a. Notwithstanding Walsh's conflicting statements regarding her relationship with the patient, the administrative judge initially found that none of the charges against Walsh had been proven. *Id.* at 30a.

The Department of Veterans Affairs petitioned the MSPB for review of the administrative judge's decision. See 5 U.S.C. 7701(e)(1)(A). The MSPB reversed in part, finding that "while employed as a social services assistant, [Walsh] engaged in sexual relations with an alcohol-dependent patient at the agency medical center." Pet. App. 41a. The MSPB further concluded that Walsh's misconduct "was intentional and continued for some 18 months." *Id.* at 42a.

Although it therefore sustained the underlying charge of misconduct, the MSPB refused to sustain the falsification charge. Pet. App. 38a-41a. The MSPB did not dispute that Walsh had made false statements to her supervisor and to agency investigators regarding her sexual relationship with the patient. Rather, relying on a new reading of the Federal Circuit's decision in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1574-1575 (1988), the MSPB held that an agency may not "separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct." Pet. App. 41a. That result was necessary, in the MSPB's view, to protect the employee's "due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of

an underlying charge." *Id.* at 40a. For the same reason, the MSPB held that Walsh's false statements could not be considered in determining the appropriate penalty to be imposed on Walsh for the underlying charge of misconduct that the MSPB had sustained. *Id.* at 42a. In light of its reversal of the falsification charge, the MSPB substituted a 90-day suspension for the penalty of removal that the agency had imposed. *Ibid.*

Chairman Erdreich filed a concurring opinion. Pet. App. 45a-49a. In his view, the conclusion that "an employee may give an untrue denial statement in response to an agency investigation * * * without the possibility of discipline for that statement * * * seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer." *Id.* at 45a. That leads to the "anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully." *Id.* at 46a. It also "give[s] federal employees a privilege not accorded to ordinary citizens who 'may decline to answer the question, or answer it honestly, but [who] cannot with impunity knowingly and willfully answer with a falsehood.'" *Id.* at 46a-47a (quoting *Bryson* v. *United States*, 396 U.S. 64, 72 (1969)). Expressing his "concerns about how this decision * * * affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service," Chairman Erdreich nonetheless concurred on the ground that *Grubka* and a later Federal Circuit decision compelled that result. *Id.* at 49a.

b. *Erickson.* Respondent Lester Erickson, Jr., was employed as a Supervisory Police Officer with the Bureau of Engraving and Printing. Pet. App. 5a.

That agency had been suffering from a series of "Mad Laugher" harassing telephone calls, in which someone anonymously called agency employees during work hours, laughed continuously, and then hung up. *Id.* at 52a. During a subsequent agency investigation, Erickson was interviewed and gave a sworn statement. *Ibid.* In his statement, Erickson claimed that he "never participated" in "Mad Laugher" calls; that he "d[id] not know who" was making the calls; and that he "d[id] not know the true identification of the 'Mad Laugher.'" *Id.* at 5a-6a. Erickson added that "[i]n my opinion it is 95% of the police unit [and] also possibly personnel in Production." *Id.* at 6a.

Because its investigation indicated that Erickson had been involved in making "Mad Laugher" calls, the agency notified Erickson that it proposed to remove him. Erickson Initial Decision 2-3 (No. DA-0752-93-0295-I-1) (MSPB July 21, 1993). The agency specifically charged Erickson with (1) making a false statement in a matter of official interest and (2) having encouraged an employee of an agency contractor to make a "Mad Laugher" call to an agency police officer. Pet. App. 52a-53a.

When the agency subsequently removed him, Erickson appealed to the MSPB. An administrative judge initially upheld Erickson's removal. Pet. App. 50a. On review, the MSPB upheld the charge that Erickson had encouraged someone to make a "Mad Laugher" phone call. *Id.* at 51a. Based on its decision in *Walsh*, however, the MSPB reversed the false statement charge and reduced the sanction of removal to a 15-day suspension. *Id.* at 52a-55a.

c. *Kye.* Respondent Sharon Kye was employed as a Supervisory General Supply Specialist for the Defense Logistics Agency. Pet. App. 59a. The agency

became aware that unauthorized use was being made of a Diners Club card that had been issued to Kye. Kye Initial Decision 1-2 (No. PH-0752-93-0524-I-1) (MSPB Nov. 12, 1993). Specifically, the card was used on a number of occasions during March 1993 to make improper cash withdrawals from ATM machines amounting to more than $2,000. *Id.* at 2. In addition, the card was used for the rental of a motel room on March 31, 1993. *Id.* at 9. Kye was not authorized to use the card at all during that period, because she was not on official travel. *Id.* at 2.

When agency investigators questioned Kye about the matter, she repeatedly maintained that she had not herself used the card for any of the improper charges. In addition, she told an agency investigator on one occasion that she had lost possession of the card while it was being misused, but that she had torn it up as soon as she regained possession of it, on April 2 or 3, 1993. Kye Initial Decision 4-5. At a later interview, she stated that she did not have possession of the card in early April 1993, but that she had in fact torn it up during the middle of April. *Id.* at 5-6. In fact, other evidence showed that she had possessed the card on March 31, when she used it at a motel. *Id.* at 9.

The agency subsequently gave Kye notice that it proposed to remove her, charging her, *inter alia*, with (1) failing to safeguard the Diners Club card, (2) failing to report its loss, theft, or compromise, (3) misuse of the card, and (4) providing false information in an official investigation. Kye Initial Decision 2-3. After her removal, Kye appealed to the MSPB. An administrative judge initially sustained Kye's removal on these grounds. Pet. App. 59a-60a. The MSPB sustained the charges of misconduct but re-

versed the false statement charge, relying on its decision in *Walsh*. *Id.* at 60a-63a. The MSPB accordingly reduced the sanction of removal to a 45-day suspension. *Id.* at 63a-64a.

d. *Barrett and Roberts.* Respondents Michael Barrett and Jerome Roberts were employed as Soil Scientists by the Department of the Interior. Pet. App. 9a. The agency received information that they, along with other employees, had worked during duty hours to build a fish pond at their supervisor's home. *Id.* at 71a. During the agency's investigation of the matter, Barrett and Roberts were asked about the incident. *Id.* at 86a. In response, "Roberts stated * * * that he did not remember anything about the building of the fish pond, while Barrett stated that he only worked on the fish pond on his own time." *Ibid.*

The agency subsequently notified Barrett and Roberts that it proposed to remove them, charging them with (1) misrepresentation or concealment of a material fact in connection with an investigation, (2) failure to report fraud, waste, and abuse, and (3) making false claims on time and attendance reports. Barrett and Roberts Initial Decision 2-3 (No. DE07529010226) (MSPB June 14, 1990). The agency subsequently decided, however, not to remove Barrett and Roberts, but rather to suspend them for 30 days and demote them. Pet. App. 71a.

Barrett and Roberts appealed to the MSPB. An administrative judge sustained the charges and proposed discipline against Barrett and Roberts. Barrett and Roberts Initial Decision 1-2; Remand Initial Decision 2 (No. DE0752900226B1) (MSPB Nov. 17, 1992). Barrett and Roberts sought review by the MSPB, which sustained the charge of making false claims on time and attendance reports, but reversed

the charge of misrepresentation during the investigation, relying on its decision in *Walsh*. Pet. App. 85a-87a.

The MSPB also reversed the charge of failure to report an act of fraud. Pet. App. 87a. In the MSPB's view, for Barrett and Roberts to have disclosed the fraud "would have necessitated implicating themselves in the misconduct of filing a false time and attendance report." *Ibid.* The MSPB concluded that "[a] charge based on such a requirement of self-implication is contrary to * * * *Walsh*." *Ibid.* Accordingly, the MSPB substituted letters of reprimand for the demotions and 30-day suspensions the agency had imposed on Barrett and Roberts. *Id.* at 88a-89a.

e. *McManus.* Respondent Harry McManus was employed as a Supervisory Correctional Officer with the Department of Justice. Pet. App. 98a. After a female correctional officer complained to the agency that McManus had made various sexual comments to her, the agency interviewed McManus. *Id.* at 25a-26a. During an initial interview, McManus denied having told the female officer that he was disappointed she had not called one evening when they were on duty together; he denied having stated that "he would have [the female officer] relieved so that she could come over to [McManus's post] and tease him more"; he "flatly denied discussing the subject of preferred sexual positions" with the female officer; and he "denied that he told [the female officer] that he had a bulge (in his pants) while talking with her." *Ibid.* In a later interview, however, he admitted that he had made some of those statements, and that he might have made all of them. *Ibid.*

The agency demoted McManus to the position of correctional officer, on the grounds that he had made sexual comments to a subordinate and that he had made false statements during an investigation. Pet. App. 25a. After he was demoted, McManus appealed to the MSPB. An administrative judge affirmed the findings of misconduct, but reduced the penalty to a 14-day suspension. *Id.* at 98a-99a.

McManus sought review by the MSPB, which affirmed the administrative judge's findings that McManus had engaged in misconduct, but reversed the false statement charge, relying on its decision in *Walsh*. Pet. App. 99a-103a. The MSPB then considered what penalty was appropriate, a question which it viewed as turning in significant part on whether the female officer had specifically discouraged McManus's remarks. The officer had said that, although she initially participated in the sex-related joking, she later told McManus to leave her alone. McManus, on the other hand, denied this. *Id.* at 101a. The agency argued before the MSPB that, when it was deciding this credibility issue, the MSPB should consider the fact that McManus initially had falsely denied having made any sexual comments at all to the officer. *Id.* at 100a.

The MSPB, however, categorically "decline[d] to consider [McManus's] false statement in analyzing the penalty issue"—even for such impeachment purposes. Pet. App. 100a. The MSPB therefore concluded that the female officer was a willing participant as to at least some of the remarks, and accordingly sustained the substitution of a 14-day suspension for the demotion the agency had imposed. *Id.* at 101a-103a.

2. In its decision in *Erickson*, the court of appeals considered appeals from the MSPB's decisions regarding Erickson, Walsh, Barrett and Roberts, and Kye. Pet. App. 1a-23a. Relying on "procedural due process concerns," the court held "that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." *Id.* at 20a-21a.

The court initially noted "that the government employees here had a protected property interest in their employment," and that they were therefore entitled both under applicable statutes and under the Due Process Clause to notice and a meaningful opportunity to be heard before adverse action was taken against them. Pet. App. 10a-11a (citing 5 U.S.C. 7513(b)). The court agreed with the MSPB that its earlier decision in *Grubka* was correctly interpreted to hold "that an employee's denial of the factual basis of a [misconduct] charge may not be used as the basis for a falsification charge." *Id.* at 15a.

The court also rejected the suggestion that there should be a distinction between denying an allegation of misconduct and denying the facts underlying the allegation. In the court's view, "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." Pet. App. 16a. The court reached this conclusion, it explained, because "employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in [the Office of Personnel Management's] view would subject them to an additional falsification charge." *Ibid.* The court also stated that if falsification charges

were permitted in this context, employees could be "coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." *Id.* at 16a-17a. In the court's view, that "would create a 'chilling effect' on their clear right to defend themselves, a 'Catch-22' situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves." *Id.* at 17a.

The court stated that its holding "d[id] not mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation." Pet. App. 17a. Rather, the court explained, "[b]eyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge." *Ibid.* The court also indicated that falsification charges are permissible with respect to false statements made "when the agency is in an investigatory mode, prior to charges having being brought" and "when investigations are conducted concerning the conduct of other employees." *Id.* at 18a.

Applying the above principles, the court of appeals affirmed the MSPB's decisions in each of the cases. Walsh's statements, the court held, were "mere denials of having an intimate relationship with the patient" and were therefore insufficient to support a false statement charge. Pet. App. 22a. Similarly, Erickson's statements denying knowledge of or participation in the "Mad Laugher" calls "were denials of having engaged in such conduct" and "were thus not otherwise false." *Ibid.* Kye's denials of having misused the credit card and her other statements "in effect were * * * denials and were not actionable false statements." *Id.* at 23a. Finally, Barrett's and Roberts' statements that "they knew nothing of the events in question" were not actionable because they were "in essence * * * denial[s] and w[ere] not otherwise false." *Ibid.*

3. Six days after its decision in *Erickson*, the Federal Circuit decided *McManus* in an unpublished opinion. The court relied on its decision in *Erickson* to hold that McManus's denials of having made sexual comments to the female officer "were within the range of denials that must be permitted in order to make meaningful the right to respond to charges." Pet. App. 28a. Accordingly, the court concluded that "the [MSPB] did not err in reversing the falsification charge against McManus." *Ibid.*

SUMMARY OF ARGUMENT

Before the federal government may deprive one of its tenured employees of a protected property interest in continued employment based on allegations of misconduct, the employee must ordinarily be given notice and an opportunity to be heard. The employee's right to be heard, however, does not include the right to make false statements with impunity during the investigation or administrative resolution of allegations of misconduct.

The court of appeals' contrary ruling confers upon federal employees suspected of misconduct an expansive right to lie. Although the court of appeals attempted to characterize its ruling as limited, the breadth of its ruling is demonstrated by its disposition of the falsification charges in these cases. Those charges involve many different false statements, given in a wide variety of circumstances, yet

the court of appeals held that none of the six respondent employees could be disciplined or removed for having made false statements.

Whatever its breadth, the right created by the court of appeals is contrary to this Court's consistent holding that the Constitution contains no right to lie, and that those who choose to answer questions falsely may be made to suffer adverse consequences. In particular, the court of appeals' ruling cannot be reconciled with this Court's decision in *United States* v. *Dunnigan*, 507 U.S. 87 (1993). In *Dunnigan*, this Court held that judges may constitutionally enhance a defendant's sentence under the Sentencing Guidelines on the ground that the defendant committed perjury at trial. *Dunnigan*'s holding that the right to testify does not include the right to testify falsely without fear of adverse consequence contradicts the court of appeals' holding in these cases that employees' right to be heard *does* include the right to make false statements with impunity. *Dunnigan* also demonstrates that the court of appeals was mistaken when it held that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." Pet. App. 21a.

Procedural due process principles provide no support for the right created by the court of appeals. Although the court of appeals apparently thought otherwise, all of the falsification charges in these cases involve statements made during agency investigations, at a time when employees do not have a procedural due process right to be heard, much less to make false statements.

More generally, when considering what procedures the Due Process Clause requires before the government may deprive individuals of their liberty or

property interests, this Court balances three factors: the private interest at stake; the risk of erroneous deprivations of that interest created by the procedures used, and the probable value of additional procedural safeguards; and the government's interest. See, *e.g.*, *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1812 (1997). Although federal employees have a significant interest in retaining their jobs, the remaining two factors tilt decidedly against the conclusion that the Due Process Clause requires that tenured federal employees be given a right to make false statements about their misconduct.

First, there is little or no risk that discipline or removal of employees for making false statements will result in erroneous deprivations. In particular, there is no basis for the court of appeals' concern that innocent federal employees will falsely admit to misconduct in order to avoid the possibility that they might be disciplined or removed for making false statements. In *United States* v. *Grayson*, 438 U.S. 41, 54-55 (1978), this Court rejected a similar concern as "entirely frivolous." Conversely, granting federal employees the right to make false statements during agency investigations and administrative proceedings would undermine the Due Process Clause's central concern with avoiding inaccurate decisions.

In any event, the court of appeals' ruling is inconsistent with compelling government interests. First, it would gravely impede federal agencies' ability to accurately investigate allegations of employee misconduct. Second, it would seriously interfere with the authority of federal agencies to determine when to discipline or remove employees who have lied about their misconduct. Such interference would undermine the government's "compelling interest in main-

taining an honest police force and civil service." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977).

The ruling of the court of appeals would also draw into question the constitutionality of other important disciplinary systems. First, the constitutional right recognized by the court of appeals would seemingly apply not only to federal employees, but also to the many employees of state and local governments who have a protected property interest in their employment. Thus, the court of appeals' ruling leads to the conclusion that the Constitution prohibits state and local governments from disciplining or removing their employees for lying about alleged misconduct. Such a rule would be a substantial and entirely unwarranted federal intrusion into the employment relationship between state and local governments and their employees. Second, the system of attorney discipline is similar in important respects to the system of federal employee discipline. Left undisturbed, the ruling of the court of appeals arguably would imply that attorneys have a right to lie during attorney discipline investigations and proceedings.

The Due Process Clause does not entitle federal employees to lie to their employing agencies about their misconduct. The dubious benefit of such a rule would be far outweighed by its unacceptable consequences.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT PROHIBIT FEDERAL AGENCIES FROM SANCTIONING EMPLOYEES FOR MAKING FALSE STATEMENTS ABOUT THEIR INVOLVEMENT IN EMPLOYMENT-RELATED MISCONDUCT

The issue in this case is whether the Due Process Clause entitles federal employees to make false statements to their employing agencies during the investigation or administrative resolution of allegations of employee misconduct. Contrary to the holding of the court of appeals, the Due Process Clause creates no such right.

A. The Holding Of The Court Of Appeals Creates A Broad Constitutional Right To Lie For Federal Employees Suspected Of Employment-Related Misconduct

The federal government has nearly three million civilian employees. U.S. Office of Personnel Management, Statistical Analysis and Services Division, *Federal Civilian Workforce Statistics* 14 (March 1997). As a result, federal agencies are often called upon to investigate and resolve allegations of employee misconduct.

Federal agencies follow varying procedures as they internally investigate such allegations. If such an investigation leads an agency to conclude that an employee has committed misconduct justifying discipline or removal, however, the agency generally must follow the procedures outlined in Chapter 75 of the CSRA, 5 U.S.C. 7501 *et seq.* As to many federal

employees, including the respondent employees,[1] the CSRA provides that an adverse action may be taken against an employee only "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). Moreover, the CSRA generally requires the agency to (1) give the employee advance written notice of the proposed adverse action, specifying the reasons for the proposed action; (2) allow the employee a reasonable time to respond; (3) permit the employee to be represented by counsel or other representative; and (4) provide the employee with a written decision with statement of reasons. See 5 U.S.C. 7503, 7513. Cf. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538-548 (1985) (employees with property interest in public employment have due process right to notice and opportunity to be heard prior to termination).[2]

If a federal agency takes a "major" adverse action, the employee may generally appeal to the MSPB. 5 U.S.C. 7503, 7512, 7513(d); *United States* v. *Fausto*,

[1] The CSRA excludes certain employees from the procedures established in Chapter 75. See 5 U.S.C. 7501, 7511. It also establishes somewhat different procedures applicable to certain specific categories of employees. See, *e.g.*, 5 U.S.C. 7541 *et seq.* (procedures applicable to adverse actions against employees appointed to the Senior Executive Service).

[2] In contrast to the procedural requirements applicable once an agency seeks to discipline or remove an employee, neither the Constitution nor the CSRA provides employees with the right to participate in their employing agencies' initial investigations. See *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (Due Process Clause is not implicated by agency investigations that do not adjudicate legal rights) (citing *Hannah* v. *Larche*, 363 U.S. 420 (1960)); see also 5 U.S.C. 7503, 7513 (employee's procedural rights under CSRA are triggered by agency's notice of proposed adverse action against employee).

484 U.S. 439, 446-447 (1988). When such appeals are brought, proceedings are typically conducted in the first instance before an administrative judge. 5 U.S.C. 7701(b)(1); 5 C.F.R. 1201.41 (1997). Full discovery is available during such proceedings, 5 C.F.R. 1201.71-1201.75 (1997), and the administrative judge may order an evidentiary hearing at which sworn testimony is taken, 5 C.F.R. 1201.41(b) (1997).[3]

During the investigatory and administrative stages of these proceedings, agencies typically require employees suspected of misconduct to make one or more statements about the allegations of misconduct. See pp. 31-33, *infra*. The holding of the court of appeals in these cases is that the Due Process Clause prohibits agencies from disciplining or removing employees for responding by making false statements. As the court put it, "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or the underlying facts relating to that other charge." Pet. App. 21a. In addition, the court held, such false statements may not even be considered in determining the penalty to apply to the underlying misconduct. *Ibid.*

Those holdings create an expansive right to lie for federal employees suspected of employment-related misconduct. The breadth of the right created by the court of appeals is demonstrated by the fact that the court reversed all of the falsification charges against all six respondent employees, even though the many

[3] The administrative judge's ruling as to the appropriateness of the adverse action is subject to review by the MSPB, 5 U.S.C. 7701(e)(1)(A), and the ruling of the MSPB is reviewable on appeal to the Federal Circuit, 28 U.S.C. 1295(a)(9).

different false statements at issue were made in a wide variety of circumstances. Pet. App. 22a-23a, 28a.

This broad disposition casts considerable doubt on the court of appeals' efforts to characterize its ruling as limited. The first asserted limit was that the right to make a false denial did not amount to a right to "make up a false story, or tell 'tall tales.'" Pet. App. 17a. The line between false denials of the factual basis of charges and "false stories" or "tall tales" is anything but readily apparent.[4] Moreover, the court gave directly conflicting signals about where it would draw that line. On one hand, the court recited, in *dicta*, examples suggesting that it might narrowly define the right to make a false denial. *Id.* at 17a-18a (falsification charge could properly be brought if employee gave false statement about employee's location at time of alleged misconduct, or about how employee came into possession of allegedly stolen government property). On the other hand, the court reversed charges based on false statements essentially indistinguishable from those discussed in the examples. *Id.* at 22a-23a (reversing falsification

[4] The proposed distinction between false denials and false stories is analogous to a distinction some courts of appeals have tried to draw when applying the so-called "exculpatory no" doctrine. That doctrine precludes the application of the federal criminal false statement statute, 18 U.S.C. 1001, to mere exculpatory denials of wrongdoing. Those courts of appeals that adhere to the doctrine have struggled unsuccessfully to develop a workable distinction between "mere denials" and other false statements. See, *e.g.*, *United States* v. *Wiener*, 96 F.3d 35 (rejecting doctrine in part for this reason), supplemented on other grounds, 104 F.3d 350 (2d Cir. 1996), cert. granted *sub nom. Brogan* v. *United States*, 117 S. Ct. 2430 (1997). In *Brogan* (No. 96-1579), this Court will consider the validity of the doctrine.

charge against respondent Kye, who made false statements about when she possessed government property); *id.* at 9a, 23a, 86a (reversing falsification charge against respondent Barrett, who made false statements about whether he was at work at given time, and when he performed work on supervisor's fish pond).[5]

The second limit the court identified was that "when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees." Pet. App. 18a. It is difficult to understand what the court meant by this asserted limitation, however, because all of the falsification charges in the present cases relate to false statements made in the course of agency investigations, and all of those false statements were made *before* the agency notified the respondent employee, pursuant to 5 U.S.C. 7513(b)(1), of its intention to take adverse action on the basis of his or her misconduct. See Pet. App. 5a (respondent Erickson), 9a (respondents Barrett and Roberts), 25a (respondent McManus), 31a-32a (respondent Walsh); Kye Initial Decision 4-6.

[5] The subsequent decisions of the MSPB reflect the conflicting signals sent by the court of appeals. Compare *Jefferson* v. *United States Postal Service*, 73 M.S.P.R. 376, 383 (1997) (without analyzing particular false statement at issue, MSPB states flatly that "An employee's denial of a charge or its underlying misconduct cannot be used in determining the reasonableness of a penalty."), with *Kirkpatrick* v. *United States Postal Service*, 74 M.S.P.R. 583, 586-587 (1997) (sustaining falsification charge because employee's "false story went beyond a mere denial and attempted to create a cover story to hide his involvement").

The third limit the court identified was that "when agency investigations are conducted concerning the conduct of other employees, false statements are actionable." Pet. App. 18a. Many agency investigations, however, involve allegations that more than one employee has engaged in misconduct. That was true, for example, in the case involving respondents Barrett and Roberts. Although their false statements related not only to their own misconduct but also to that of their supervisor, *id.* at 9a, the court nevertheless reversed the falsification charges against them, *id.* at 23a. Apparently, the court's view is that federal employees are obliged to tell the truth during an agency investigation only when they are not among those suspected of involvement in the misconduct being investigated.

B. This Court Has Consistently Rejected Claims That The Constitution Confers A Right To Lie

Whatever its breadth, the court of appeals' ruling is contrary to this Court's consistent holding that the Constitution contains no right to lie, and that those who choose to answer questions falsely may be made to suffer adverse consequences.

Most recently, the Court held in *United States* v. *Dunnigan*, 507 U.S. 87 (1993), that judges may constitutionally enhance a defendant's sentence under the Sentencing Guidelines on the ground that the defendant committed perjury at trial. See *id.* at 96 ("[The] right to testify does not include a right to commit perjury."). Accord *United States* v. *Grayson*, 438 U.S. 41, 52 (1978) (reaching same conclusion prior to enactment of Sentencing Guidelines).

The right to testify is rooted in the same due process principles that provide tenured federal employees with a right to be heard before they are removed. See *Rock* v. *Arkansas*, 483 U.S. 44, 51 & n.9 (1987). *Dunnigan*'s holding that the right to testify does not include a right to commit perjury plainly contradicts the Federal Circuit's holding that the right to a meaningful opportunity to be heard *does* include the right to make false statements. Moreover, the specific holding of *Dunnigan* that a defendant's sentence may be enhanced for false testimony is irreconcilable with the Federal Circuit's conclusion that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." Pet. App. 21a.[6]

[6] The court of appeals sought to distinguish *Dunnigan* on the ground that *Dunnigan* "only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees." Pet. App. 21a That account is wrong. The burden of proof in the federal criminal *sentencing* context is ordinarily precisely the same preponderance-of-the-evidence standard that applied to the charges of falsification in these cases. See *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 comment.).

The court of appeals also stated that "the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4 [which requires federal employees to cooperate with investigations and to testify truthfully], thereby justifying a penalty beyond that levied on the basic offense." Pet. App. 21a. The Guidelines provision at issue in *Dunnigan*, however, applies not only to perjury at trial, but also to unsworn false statements that obstruct an investigation. See Guidelines § 3C1.1 & Application Note 3(g). Conversely, the right to lie created by the Federal Circuit applies not only to unsworn statements made by employees, but also to sworn ones, as is demonstrated by the fact that some of the false statements in these cases were sworn. See, *e.g.*, Pet. App. 52a. In any event, whether sworn or not, the false statements made by the respondent employees were of a kind punishable under the

In many other contexts, this Court has rejected claims that the Constitution protects individuals from the consequences of their false statements. Witnesses who testify falsely before the grand jury may be prosecuted for perjury, even if their testimony was compelled by grant of immunity from prosecution, *United States* v. *Apfelbaum*, 445 U.S. 115, 123-132 (1980); *Glickstein* v. *United States*, 222 U.S. 139, 141-142 (1911), or even if they claim not to have understood their Fifth Amendment privilege against self-incrimination, *United States* v. *Wong*, 431 U.S. 174, 177-180 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) (opinion of Burger, C.J.). Similarly, those who submit false statements to the government may be criminally prosecuted, even if the statements are provided in connection with an allegedly unconstitutional statutory scheme, *Kay* v. *United States*, 303 U.S. 1, 6-7 (1938); *United States* v. *Kapp*, 302 U.S. 214, 217-218 (1937), and even in the face of a claim that the government unlawfully compelled the statements at issue, *United States* v. *Knox*, 396 U.S. 77, 79-84 (1969); *Bryson* v. *United States*, 396 U.S. 64, 67-73 (1969). Finally, the Court has rejected arguments by criminal defendants that the Sixth Amendment right to counsel or the exclusionary rule protects them from adverse consequences arising from their efforts to testify falsely. See *Nix* v. *Whiteside*, 475 U.S. 157, 173-174 (1986) ("For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or

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criminal law. See 18 U.S.C. 1001 (criminal false statement statute); 18 U.S.C. 1621 (criminal perjury statute). Thus, even if the gravity of the false statement were relevant to the analysis, that factor would be no basis upon which these cases could be distinguished from *Dunnigan*.

to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully."); *United States* v. *Havens*, 446 U.S. 620, 624-628 (1980) (exclusionary rule does not protect criminal defendants from impeachment at trial with prior inconsistent statements obtained in violation of Fourth Amendment or requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)).

In sum, this Court's "cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry." *Mandujano*, 425 U.S. at 577 (opinion of Burger, C. J.). The decision of the court of appeals in the present cases cannot be reconciled with this Court's unbroken, and unambiguous, precedent.

C. The Due Process Clause Does Not Support the Ruling Below

The court of appeals held that disciplining or removing the respondent employees on the basis of their false statements would offend procedural due process. This holding is clearly incorrect. The Due Process Clause does not compel the federal government to grant its employees immunity from employment-related sanction for making false statements in connection with agency investigations into their misconduct.

Although the court of appeals apparently thought otherwise, all of the falsification charges at issue in these cases involve statements made by the respondent employees during agency investigations, *before* they had been given notice that their agencies proposed to discipline or remove them. See p. 21, *supra*.

Due process is not implicated by such agency investigations, because they "adjudicate[] no legal rights," and therefore do not deprive individuals of any liberty or property interest. *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (SEC's use of subpoenas during investigation does not implicate Due Process Clause) (citing *Hannah* v. *Larche*, 363 U.S. 420, 440-443 (1960) (witnesses called before investigatory body have no due process rights to be informed of specific charges being investigated, to be informed of identity of complainants, or to cross-examine other witnesses)). Given that the respondent employees had no procedural due process right to be heard during the agencies' investigations, it is difficult to understand the court of appeals' conclusion that they did have a procedural due process right to make false statements at that time without fear of employment sanction. The court of appeals certainly identified no legal support for such a conclusion.[7]

In any event, the Due Process Clause does not provide federal employees with the right to make false statements to their employer at any time. The Due Process Clause provides tenured public employees with the right to notice and an opportunity to be

[7] In fact, although the court of appeals characterized its ruling as being rooted in principles of procedural due process, the court's ruling in effect creates a substantive right for federal employees to make false statements about their misconduct without fear of employment sanction. This Court's cases (see pp. 22-25, *supra*), however, foreclose any suggestion that such a right is "so deeply rooted in our history and tradition, or so fundamental to our concept of ordered liberty" as to be protected by the substantive component of the Due Process Clause. *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2271 (1997).

heard prior to their removal.[8] See *Loudermill*, 470 U.S. at 538-546. It also provides such employees with the right to "a more comprehensive post-termination hearing." *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1811 (1997). The procedural protections provided by the CSRA are more than adequate to meet these requirements. See 5 U.S.C. 7503, 7513 (providing employees with right to notice and opportunity to be heard prior to imposition of discipline); 5 U.S.C. 7513(d), 7701, and 28 U.S.C. 1295(a)(9) (providing for administrative and judicial review of major adverse actions against employees).

Nothing in *Loudermill* or in any other case decided by this Court even remotely suggests that a public employee's due process right to an opportunity to be heard before being removed for misconduct includes a right to lie to his or her employer about the alleged misconduct. To the contrary, well-settled principles of due process law compel the conclusion that no such right exists.

[8] The Due Process Clause provides this protection to those public employees who have a constitutionally protected property interest in their continued employment. *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1811 (1997). Many federal employees have such an interest. See *ibid.* (public employees who can be discharged only for cause have property interest in continued employment); 5 U.S.C. 7501(1), 7503(a), 7511, 7513(a) (specifying federal employees who may be disciplined or removed only for cause).

This Court has not yet decided whether "the protections of the Due Process Clause extend to discipline of tenured public employees short of termination." *Homar*, 117 S. Ct. at 1811. Cf. *id.* at 1812-1814 (tenured public employee charged with felony did not have right under Due Process Clause to hearing prior to suspension without pay).

When considering what procedures the Due Process Clause requires before the government may deprive individuals of their property or liberty interests, this Court balances three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest.

Homar, 117 S. Ct. at 1812 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). Although federal employees who are faced with possible removal have a significant interest in the outcome of agency disciplinary proceedings,[9] see *Loudermill*, 470 U.S. at 543, the two remaining factors tilt decidedly against a conclusion that the Due Process Clause requires that tenured federal employees be given a right to make false statements about their employment-related misconduct. The dubious benefit of such a rule would be far outweighed by its obviously unacceptable consequences.

[9] When discipline short of removal is proposed, the employee's interest may be significantly reduced, and, in fact, the requirements of the Due Process Clause may not even be implicated. See *Homar*, 117 S. Ct. at 1811, 1813.

1. The discipline or removal of federal employees for making false statements about their employment-related misconduct does not create a risk that they will be erroneously deprived of their property interest in continued federal employment

The court of appeals' holding rested heavily on the concern that employees might otherwise "be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." Pet. App. 16a-17a. This concern is unwarranted.

Prior to the rulings in these cases, the MSPB for years had been sustaining discipline or removal of employees for making false statements during agency investigations into employee misconduct, see pp. 37-38, *infra*, and there had been no indication that this practice was causing innocent employees to falsely admit that they engaged in misconduct. Cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (noting that criminal defendants are "unlikely to be driven to false self-condemnation"). To the contrary, the many reported cases in which employees falsely deny misconduct suggest that the problem, if there is one, is insufficient deterrence of false denials, not undue chilling of true ones.[10]

[10] The court of appeals' concern that agency discipline for false statements might have a chilling effect on employees' exercise of their right to be heard was exaggerated in part because the court of appeals incorrectly assumed that such discipline is automatic. Pet. App. 4a. Separate charges of falsification are not always brought when an agency believes an employee has falsely denied misconduct. See, *e.g.*, *DeWitt* v. *Department of the Navy*, 747 F.2d 1442, 1443-1446 (Fed. Cir.

In comparable circumstances, this Court has firmly rejected assertions that imposing sanctions on those who make false statements will deter innocent persons from exercising their right to be heard. For example, in *Grayson*, *supra*, this Court considered the claim that criminal defendants' right to testify would be chilled if judges could take into account at sentencing their belief that the defendant testified falsely at trial. The Court dismissed that claim, pointing out that any chilling effect on false testimony would be "entirely permissible," and that the assertion that truthful testimony would be inhibited was "entirely frivolous." 438 U.S. at 54-55.

2. *Permitting federal employees to lie would be contrary to compelling governmental interests*

Even if disciplining or removing employees for making false statements did have some chilling effect on employees' exercise of their right to be heard, the Due Process Clause would not prohibit such discipline or removal. As this Court explained in *Dunnigan*: "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions

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1984) (no falsification charge was brought against employee who made false statements to agency investigators; false statements considered in determining penalty), cert. denied, 470 U.S. 1054 (1985). Moreover, a charge of falsification cannot be sustained simply because an employee's statements regarding alleged misconduct are found to have been inaccurate. Rather, a falsification charge may be sustained only if the statements are found to have been made with the intent to deceive. See, *e.g.*, *Naekel* v. *Department of Transp.*, 782 F.2d 975, 977 (Fed. Cir. 1986). Cf. *Dunnigan*, 507 U.S. at 95 (noting that sentencing judge cannot automatically enhance sentence simply because defendant testified at trial but was convicted).

whether or not to exercise constitutional rights." 507 U.S. at 96 (citing cases). Thus, as has been noted, the Court in *Dunnigan* upheld the practice of enhancing a criminal defendant's sentence under the Sentencing Guidelines based on the sentencing judge's determination that the defendant had committed perjury at trial, notwithstanding the claim that the practice chilled defendants' exercise of their right to testify. *Ibid.* See also, *e.g.*, *Hayes*, 434 U.S. at 362-365 (rejecting claim that plea bargaining unconstitutionally pressures innocent defendants to plead guilty).

a. The court of appeals' ruling will seriously impede agencies' ability to investigate and resolve allegations of employee misconduct

Federal agencies investigating allegations of employee misconduct necessarily require the assistance of their employees. See, *e.g.*, *Weston* v. *HUD*, 724 F.2d 943, 949 (Fed. Cir. 1983) ("A large enterprise cannot be managed effectively absent a willingness of its members to support its internal fact-finding endeavors."). It is thus well established that federal employees must cooperate in such investigations, and that employees who refuse to cooperate may be disciplined or removed. *Id.* at 947-951 (upholding removal of employee who refused to cooperate with HUD Inspector General's internal investigation into allegations of conflict of interest involving employee).

If the alleged misconduct is criminal in nature, the agency's questioning may implicate the employee's Fifth Amendment privilege against self-incrimination. Even if that is so, the employee can still be required to cooperate with the investigation, so long as the employee is advised that the employee's state-

ments will not be used against the employee in criminal proceedings. *Weston*, 724 F.2d at 948. As one court put it:

> To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the [Fifth Amendment] beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights.

Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972). See also *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

Employees' obligation to participate extends beyond the agency's preliminary investigation. For example, if an employee challenges an agency's adverse action by appealing to the MSPB, full discovery is available during proceedings before the administrative judge, 5 C.F.R. 1201.71-1201.75 (1997), and the administrative judge may order an evidentiary hearing at which sworn testimony is taken, 5 C.F.R. 1201.41(b) (1997). The employee who is challenging the adverse action may be required to participate in discovery and to testify at a hearing. See 5 C.F.R. 5.4 (1997) (employees must provide information and testify under oath when required by MSPB personnel); *Reid* v.

United States Postal Service, 54 M.S.P.R. 648, 655 (1992) (employee challenging adverse action may be called by employer as witness at hearing). If the employee fails to comply with these obligations, sanctions may be imposed up to and including dismissal of the employee's appeal. Cf. *Roth* v. *Department of Transp.*, 54 M.S.P.R. 172, 175-177 (1992) (where employee willfully refused to attend deposition, administrative judge did not abuse discretion by imposing sanction that had effect of causing dismissal of appeal), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (Table).

If, however, employees suspected of misconduct are free to lie during agency investigations without fear of employment sanction, the reliability of the information agencies receive from their employees will doubtless be significantly reduced.[11] Inevitably, agency investigations will be impeded and obstructed, and in some cases agencies will reach inaccurate conclusions about allegations of employee misconduct.[12] Cf.

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[11] Of course, the possibility of criminal prosecution for false statements or perjury might remain. Because of limits on prosecutorial resources, *inter alia*, that possibility is not necessarily so great as to result in a very high level of deterrence. Cf. *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 329 (1994) (Scalia, J., concurring in the judgment) ("United States Attorneys doubtless cannot prosecute perjury indictments for all the lies told in the Nation's federal proceedings."). In any event, the possibility of criminal prosecution for false statements or perjury is not a substitute for other appropriate consideration of such conduct. Cf. *Grayson*, 438 U.S. at 53-55 (perjury at trial may be considered at sentencing on underlying offenses, even though it also may be punished separately in subsequent criminal prosecution for perjury).

[12] Often, false statements by employees about their involvement in misconduct will have the effect of impeding an agency's investigation into wrongdoing by other employees.

Sentencing Guidelines § 3C1.1 & Application Note 3(g) (requiring enhancement of sentence of defendants who impede investigation by making material false statements to criminal investigators).

The same is true with respect to administrative proceedings before the MSPB. If employees are free to lie in connection with such proceedings without fear of employment sanction, as the court of appeals held, the reliability of employees' statements and testimony will certainly diminish, with a corresponding adverse effect on the accuracy of the proceedings.[13] As this Court recently noted,

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For example, respondents Roberts and Barrett falsely denied having helped build a fishing pond for their supervisor during work hours. Pet. App. 71a. Those false denials may well have impeded the agency's investigation not only into their misconduct, but also into the misconduct of their supervisor.

[13] An extreme example of this is provided by the decision of the MSPB in respondent McManus's case. Pet. App. 97a-105a. In order to determine the proper discipline to be imposed upon McManus for making sexual remarks to a subordinate, the MSPB had to resolve a conflict in testimony between McManus and the subordinate as to whether the remarks were welcome. *Id.* at 100a. The MSPB concluded, however, that it could not lawfully consider, in resolving this conflict, the fact that McManus had originally falsely denied making the remarks at all. *Ibid.* The MSPB went on to find that at least some of the remarks were welcome. *Id.* at 101a-102a.

Immunizing employees from even the impeaching effect of their prior false statements stands in stark contrast to this Court's cases, which hold that defendants who testify falsely may generally be impeached with their prior inconsistent statements, even if evidentiary use of those statements would otherwise be foreclosed by the exclusionary rule. See, *e.g.*, *Havens*, 446 U.S. at 624-628.

> In any proceeding, whether judicial or administrative, deliberate falsehoods "may well affect the dearest concerns of the parties before a tribunal," and may put the factfinder and parties "to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or [by] other collateral means."

ABF Freight System, Inc. v. *NLRB*, 510 U.S. 317, 323 (1994) (quoting *United States* v. *Norris*, 300 U.S. 564, 574 (1937)).

One of the principal concerns of the Due Process Clause is the accuracy of proceedings through which determinations are made respecting individuals' property and liberty interests. See, *e.g.*, *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."). See also *Loudermill*, 470 U.S. at 544 (purpose of due process right to pre-termination hearing is to provide "an initial check against mistaken decisions"). It would be anomalous indeed, therefore, to interpret the Due Process Clause as granting anyone a right to attempt to distort the accuracy of such proceedings through intentional deceit. To the contrary, "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." *ABF Freight System*, 510 U.S. at 323.

b. The court of appeals' ruling will seriously interfere with the ability of the federal government to determine when to discipline or remove employees who lie

This Court has recognized that the "Government has compelling interests in maintaining an honest police force and civil service." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977). Federal law fully reflects that compelling interest. Thus, federal employees are specifically directed not to "engage in * * * dishonest * * * conduct." 5 C.F.R. 735.203 (1997). The federal courts and the MSPB have repeatedly held that federal agencies may discipline or remove employees for engaging in dishonest conduct related to their employment.[14] See, *e.g.*, *Gipson* v. *Veterans Administration*, 682 F.2d 1004, 1011-1012 (D.C. Cir. 1982) (upholding removal of employee for falsifying medical records; "the falsification of government records is a serious offense in any context"); *Hamilton* v. *Department of the Air Force*, 52 M.S.P.R. 45, 47 (1991) (upholding removal of employee for making false statement in employment application, stating: "The [MSPB] has held that removal for falsification of government documents promotes the efficiency of the service because such falsification raises serious doubts regarding the employee's honesty and fitness for employment."), aff'd, 980 F.2d 744

[14] Although the present cases involve false statements made in the course of employment, employees in some circumstances may also be disciplined or removed for dishonest conduct less directly related to employment. See, *e.g.*, *Fike* v. *Department of the Treasury*, 10 M.S.P.R. 113, 116-117 (1982) (upholding removal of IRS employee convicted of false pretenses for submitting false claim to insurance company).

(Fed. Cir. 1992) (Table). Cf. *NLRB* v. *Mueller Brass Co.*, 509 F.2d 704, 713 (5th Cir. 1975) ("Any employer has the right to demand that its employees be honest and truthful in every facet of their employment.").[15]

These principles apply equally to employees who make false statements during an agency investigation into alleged misconduct by the employee. Indeed, up until the present cases, the MSPB had consistently upheld agencies' power to discipline or remove such employees. See, *e.g.*, *Greer* v. *United States Postal Sevice*, 43 M.S.P.R. 180, 184-187 (1990) (upholding suspension of employee for committing misconduct and making false statements to supervisor about it); *Vazquez* v. *Department of Justice*, 12 M.S.P.R. 379, 381-384 (1982) (upholding removal of INS agent for improper conduct and for making false statements to investigators; employee "clearly undermined the agency's confidence in his veracity when, over a period of several months, he adamantly denied knowledge of the incident"). A rule that federal agencies may not remove or discipline employees for making false statements is incompatible with the govern-

[15] Because dishonest conduct related to employment "goes to the heart of the employer-employee relationship," it often results in removal of the offending employee. *Pichot* v. *Department of Justice*, 29 M.S.P.R. 477, 481 (1985). There is no per se rule requiring removal as the sanction for dishonest conduct, however, and agencies in some circumstances conclude that a lesser sanction would be appropriate. For example, in the present case, the Department of the Interior imposed discipline short of removal upon respondents Barrett and Roberts, even though they had made false statements during the agency's investigation. Pet. App. 71a.

ment's compelling interest in ensuring the integrity of the federal civil service.[16]

D. The Holding Of The Court Of Appeals Draws Into Question The Constitutionality Of Other Important Disciplinary Systems

The due process right created by the court of appeals in the context of federal public employment would presumably apply equally to the many state and local public employees who have a protected property interest in their continued employment. Cf., *e.g.*, *Loudermill*, 470 U.S. at 538-541 (finding that employees of local school boards had property interest in continued employment). State and local public employers frequently discipline or remove their employees for making false statements in connection with investigations into employee wrongdoing,[17] and the rule adopted by the court of appeals would prohibit that practice as a matter of federal constitutional law. Forbidding state and local public employers from

[16] Although the government's interests in the present cases are compelling, such a showing is not essential for the government to prevail against a procedural due process claim. See, *e.g.*, *Homar*, 117 S. Ct. at 1807 (state has "significant" interest in immediately suspending employees charged with felony).

[17] See, *e.g.*, *Talmo* v. *Civil Service Comm'n*, 282 Cal. Rptr. 240, 252 (Ct. App. 1991) (upholding dismissal of deputy sheriff for committing misconduct and lying to superiors about it; "When an officer of the law violates the very law he was hired to enforce and lies about it to his superiors he forfeits the trust of his department and the public."); *Christenson* v. *Board of Fire & Police Comm'rs*, 404 N.E.2d 339, 341-343 (Ill. App. Ct. 1980) (police officer disciplined for committing misconduct and lying about it); *Williams* v. *Dooley*, 538 N.Y.S.2d 871, 872-873 (App. Div. 1989) (correctional officer dismissed for committing misconduct and giving false information during investigation).

disciplining or removing their employees for making false statements about their misconduct would be a substantial and unwarranted federal intrusion into the employment relationships between state and local public employers and their employees.

The approach adopted in these cases would also have profound implications for the present system of attorney discipline. Attorneys generally have a right under the Due Process Clause to notice and an opportunity to be heard before they are disbarred. *In re Ruffalo*, 390 U.S. 544, 550 (1968). They are required to cooperate with investigations into allegations that they may have committed misconduct.[18] See *Model Rules of Professional Conduct* Rule 8.1(b) ("a lawyer * * * in connection with a disciplinary matter, shall not * * * knowingly fail to respond to a lawful demand for information from [a] * * * disciplinary authority"). And, they are frequently disciplined or disbarred for making false statements during the disciplinary process. See *id.* Rule 8.1(a) ("a lawyer * * * in connection with a disciplinary matter, shall not * * * knowingly make a false statement of mate-

[18] As with employee discipline, Fifth Amendment issues may arise where the attorney's alleged misconduct is criminal in nature. See, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511, 514-516 (1967) (opinion of Douglas, J.) (lawyer may not be disbarred for asserting Fifth Amendment privilege in disciplinary proceeding); *id.* at 519-520 (opinion of Fortas, J., concurring in the judgment) (same). Also as with employee discipline, however, an attorney who would otherwise have a Fifth Amendment privilege may nevertheless be compelled to testify in disciplinary proceedings if the attorney is given adequate assurance that any testimony given will not be used against the attorney in criminal proceedings. See, *e.g.*, *In re March*, 376 N.E.2d 213, 217-220 (Ill. 1978).

rial fact"), Rule 8.4(c) ("It is professional misconduct for a lawyer to * * * engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."). See also, *e.g.*, *Worth* v. *State Bar*, 586 P.2d 588, 590 (Cal. 1978) (false statement to state bar disciplinary authorities was "greater offense" than underlying misconduct of misappropriating client's funds). See generally ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* 527-537 (3d ed. 1996).

If the court of appeals were correct that the Due Process Clause forbids the imposition of discipline on federal employees in analogous circumstances, it would arguably follow that the Due Process Clause forbids the discipline or disbarment of attorneys who lie to bar authorities about allegations that they have committed misconduct. Such a conclusion would clearly be inconsistent with the strong public interest in ensuring the integrity of the members of the bar.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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